



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

LEGISLATIVE PROPOSAL (T&E-2006-07): MENTALLY IMPAIRED CLIENTS: ATTORNEY AUTHORITY TO PROTECT & CONFIDENTIALITY EXCEPTION

TO: Larry Doyle, Chief Legislative Counsel, State Bar Office of Governmental Affairs

FROM: Peter S. Stern, Co-Chair, Trusts & Estates Section Incapacity Subcommittee

RE: Mentally Impaired Clients: Attorney Authority to Protect & Confidentiality Exception
(ABA MRPC 1.14) -- Project No. 2006-07 (2003-04)

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SECTION ACTION:

Date of Approval by Trusts and Estates Section Executive Committee: 6/11/05, 23 for, 1 against
(prior vote 10/25/03, 22 for, 1 against)

Date of Approval by Trusts and Estates Section Incapacity Committee: 8/25/03; 10/20/03 (minor
modifications), unanimous; ratification vote, 6/6/05, unanimous.

DIGEST:

California currently has neither a rule of professional conduct nor a law that specifically
addresses the obligations of a lawyer who represents a mentally impaired client. Further, to the

extent that California statutory and case authority address the issue, those authorities tend to conflict with the majority of other jurisdictions, as well as to be internally contradictory.

Business and Professions Code §6068(e) currently provides:

6068. It is the duty of an attorney to do all of the following: . . .
(e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

Evidence Code §§952 and 954 define and provide for the protection of disclosure of confidential information communicated from a client to an attorney, with exceptions in the case of the commission of a crime or a fraud or to prevent a client from committing a crime.

The Model Rules of Professional Conduct (MRPC) developed by the American Bar Association (ABA), and adopted in one form or another by 46 states and other U.S. jurisdictions, have long included a rule (1.14) specifically addressing the obligations of a lawyer who represents a mentally impaired client. In 2002 and 2003, the ABA adopted its Ethics 2000 Report, which revised Rule 1.14 to provide specific authority for a lawyer to take reasonably necessary action to protect the interests of a client with diminished capacity, and to reveal otherwise confidential client information to the extent reasonably necessary to effect that protection:

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

As of August 1, 2005, 18 states^a had adopted the revised Model Rules, including 1.14 (all with the confidentiality exception included in subdivision (c), though with very minor modifications in some cases^b). Ethical rules revision committees in at least nine additional states, -- and perhaps as many as four others,^c not including California -- have recommended the adoption of revised rules including 1.14, and are awaiting final approval from their respective supreme courts.

Ethics opinions from the California State Bar and from the Bar Associations of San Diego, Los Angeles and San Francisco interpret the provision of the current statutory framework differently, with the State Bar, San Diego and Los Angeles concurring that an attorney with a mentally impaired client may take no action which would disclose the client's secrets and the San Francisco opinion holding that the attorney in such a situation may take action to protect the client. The State Bar's Estate Planning, Trust, and Probate Section (now the Trusts and Estates Section), in its Guide to the California Rules of Professional Conduct For Estate Planning, Trust and Probate Counsel (1997), advocated adoption of a rule of professional conduct similar to the ABA Model Rule 1.14.

This proposal would remedy the current lack of a provision in California, and would also provide guidelines for attorneys dealing with a mentally impaired client. At the same time, the provision would not allow an attorney to take steps to conserve a client, which steps are authorized by the

^a Arizona, Arkansas, Delaware, Idaho, Indiana, Iowa, Louisiana, Maryland, Minnesota, Montana, Nebraska, New Jersey, North Carolina, Oregon, Pennsylvania, South Carolina, South Dakota, and Virginia.

^b IN: Adds: "(d) This Rule is not violated if the lawyer acts in good faith to comply with this Rule."

LA: Finishes last sentence of (b) with "...appointment of a fiduciary, including a guardian, curator or tutor, to protect the client's interests." (as opposed to "...appointment of a guardian ad litem, conservator or guardian")

NJ: Labeled "Client Under a Disability" instead of "Client with Diminished Capacity"

NC: omits "conservator" in (b)

VA: Labeled "Client with Impairment" instead of "Client with Diminished Capacity"

^c The following state ethical review committees have proposed adoption of the revised text of MRPC 1.14, with the exceptions noted below: CO, DC, IL, MI, NH, OH, VT, WA, WI. Proposed revisions in four additional jurisdictions, CT, MO, NV and UT, were not available for viewing online.

DC: The Committee recommends a few modifications to the ABA text, particularly to caution lawyers that surrogate decision-making options other than formal guardianships or conservatorships may best serve clients with diminished capacity, and lawyers should advocate the least restrictive form of intervention in the client's decision-making.

VT: Adds:

"(d) In an emergency where the health, safety, or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of the person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, provided that the following conditions exist:

(1) The person or another person acting in good faith in that person's behalf has consulted with the lawyer.

(2) The lawyer reasonably believes that the person has no other lawyer, agent or other representative available.

The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer acting under this paragraph has the same duties under these rules that the lawyer would have with respect to a client. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible."

ABA Model Rules. Thus, the proposed rule preserves to the greatest extent possible California's strict prohibition against taking positions adverse to a client, allowing an attorney only to act to protect the interests of the client, and then only to the most limited extent.

APPLICATION:

This bill will enable an attorney to notify the proper individuals or entities of limited facts necessary to protect the attorney's client where the attorney reasonably believes that the client is at risk of substantial physical, financial or other harm due to the client's impairment.

ILLUSTRATIONS:

An attorney represents a client who has no close relatives and has become very attached to the client's caregiver. The attorney believes, based upon conversations with the client, that the client would meet the standard for imposing a conservatorship because the client has exhibited symptoms such as extreme short-term memory loss and confused thinking. The attorney has learned from the client that the client wrote a check to the caregiver for \$10,000 for a Christmas gift and intends to transfer her checking account into a joint tenancy account with the caregiver. The attorney knows, solely from prior conversations with the client, that the caregiver has a gambling problem and is concerned that the proposed transfer of assets will harm the client and lead to her losing substantial funds. The client has not authorized the attorney to tell anyone about this. If this legislation were in place, the attorney could notify either a family member or an entity, such as APS, to investigate the actions of the caregiver prior to the client's losing substantial funds to the caregiver.

DOCUMENTATION:

The author is unaware of any documentary evidence of the problem, beyond ongoing discussions among estate planning and elder law attorneys. There is a substantial accumulation of anecdotal evidence contributed by members of the Section's Executive committee relating examples of clients who have been victims of neglect or abuse and whose attorneys, aware of such neglect or abuse, have not been authorized to seek assistance for their clients. The ABA, jointly with the American Psychological Association, has published *Assessment of Older Adults with Diminished Capacity: A Handbook for Attorneys* in 2005, which underscores the increasing prevalence of capacity questions and the need to train attorneys to assess their clients, to seek assistance for impaired clients, and turn to professionals for assessment assistance. The National Academy of Elder Law Attorneys in May 2005 released draft *Commentaries to the Aspirational Standards for the Practice of Elder Law*, which call upon elder law attorneys to take appropriate measures to protect the client along the lines of MRPC 1.14. The need for clear standards has been recognized throughout the country.

HISTORY:

Although there have been several attempts to make changes consistent with the present proposal at the level of the State Bar's former Conference of Delegates in the past few years, no similar proposal of legislation has been made. However, the rationale behind this proposal -- that there

are certain public interests that should be given recognition equivalent to that given to the attorney-client privilege in certain circumstances -- supported the recent enactment of AB 1101 (Chapter 765, Statutes of 2003), which amended Business & Professions Code §6068(e) to allow disclosure of attorney-client privileged information in strictly limited criminal law contexts. On April 5, 2002, the Trusts and Estates Section submitted a lengthy and thoroughly documented request to the Bar's Rules Revision Commission to resolve the problems described in the Digest of this legislative proposal, calling on the Rules Revision Commission to begin to fashion a Rule of Professional Conduct that would resolve the conflict among the ethics opinions cited above, align California with the ABA's MRPC 1.14, and provide working guidelines for California attorneys who deal with impaired clients. Under growing pressure from Section members to move the issue along, the Section forwarded this legislative proposal to the State Bar's Board of Governors in 2004, and the Board of Governors in its December 2004 meeting chose to refer this proposal to the Rules Revision Commission rather than to recommend it for adoption by the Legislature.

The authors of this proposal have attended at least three meetings with the full Rules Revision Commission, or subcommittees thereof since December 2004, at which this proposal and the need for its adoption have been discussed. The Rules Revision Commission has not yet made any specific proposal. It is appropriate now for the Board of Governors to review this issue and to send this proposal, which seeks a change in law, to the Legislature, while simultaneously asking the Rules Revision Commission to fashion a rule consistent with this legislation. The discussions in the Rules Revision Commission meetings to which the authors of this proposal have been invited have clearly pointed to the need of change both in the law and in the rules: it would clearly be inadequate to rely only upon a rule of professional conduct, which would not resolve the nearly absolute mandate of confidentiality in Business & Professions Code §6068(e); and passage alone of this legislative proposal would open a hole in the Rules of Professional Conduct.

The authors believe that the most appropriate model to follow is that of AB 1101, which came out of the Legislature with a delayed effective date, to permit the fashioning of a Rule of Professional Conduct (Rule 3-100). AB 1101 and Rule 3-100 both became effective on July 1, 2004. As they have done since January 2005, the authors, and other members of the Trusts and Estates Section's Executive Committee, will continue to work constructively with the Rules Revision Commission and with the appropriate Legislative staff and Committees in developing this legislation and an accompanying rule of professional conduct.

PENDING LITIGATION:

None known.

LIKELY SUPPORT/OPPOSITION:

The Trusts and Estates Section will support this legislation. Similar proposals have been discussed by the Conference of Delegates of the State Bar in prior years, but none has been adopted. Those persons supportive of AB 1101 are more likely to be supportive of this (AB 1101 was sponsored by Assembly member Steinberg) and those groups that opposed AB 1101 are

likely to be against this proposal as well. This proposal would be supported by ABA members as it brings California law in line with ABA rules. Groups concerned with elder abuse are likely to be supporters of this proposal, which was enthusiastically endorsed in concept by the October 2003 Financial Elder Abuse Seminar organized by the San Francisco Consortium for Elder Abuse Prevention. There will likely be some opposition to this legislation from attorneys who do not wish to have this issue dealt with by the Legislature.

FISCAL IMPACT:

No anticipated fiscal impact.

GERMANENESS:

This proposed legislation regulates the conduct of attorneys, particularly those attorneys practicing in the trusts and estates section and is thus uniquely within the scope of the section's interests and knowledge.

TEXT OF PROPOSED LEGISLATION:

SECTION 1. Section 6068.5 is added to the Business and Professions Code, to read:
6068.5. Notwithstanding Section 6068, above,

(a) If a client's capacity to make adequately considered decisions in connection with a representation is significantly impaired, the attorney shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client.

(b) If the attorney reasonably believes that the client has significantly impaired capacity and as a result thereof 1) is at risk of substantial physical, financial, or other harm unless action is taken, and 2) cannot adequately act in the client's own interest, the attorney may, but is not required to, notify those individuals or entities that have the ability to take action to protect the client.

(c) If an attorney takes action pursuant to paragraph (b), above, the attorney is authorized to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

(d) Nothing in this section permits an attorney to file, or represent a person filing, a conservatorship petition or similar action concerning the attorney's client, where the attorney would not otherwise be permitted to do so, nor to take a position adverse to the client beyond the notification permitted in paragraph (b), above.

(e) "Significantly impaired capacity" as used in this section shall mean that the client suffers from an impairment that would be sufficient to support a determination of incapacity under Probate Code Sections 811(a) and (b).

(f) An attorney shall not be held liable for taking or forbearing to take the action authorized by this section.